Supreme Court, U.S.
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No. 02-151

IN THE

Supreme Court of the United States

CAROLYN A. ("HOWERTER") LA FAVRE, AND JAMES SCOTT MERRITT, JR., ON BEHALF OF THEMSELVES AND ALL SINGLE KANSAS INCOME TAX PAYERS,

Petitioners,

v.

KANSAS DEPARTMENT OF REVENUE, A KANSAS AGENCY, TIM SHALLENBURGER, AS STATE TREASURER OF KANSAS, STEPHEN S. RICHARDS, SECRETARY OF REVENUE OF THE KANSAS DEPARTMENT OF REVENUE, JEFFREY LOCHOW, DIRECTOR OF DIVISION OF TAXATION OF THE KANSAS DEPARTMENT OF REVENUE, AND DAVID J. HEINEMANN, AS AGENT AND DESIGNEE OF SECRETARY OF REVENUE AND OF DIRECTOR AND DIVISION OF TAXATION OF KANSAS DEPARTMENT OF REVENUE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KANSAS

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF ON PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 15.8, petitioners wish to call the Court's attention to the intervening matter discussed below, which transpired after the instant petition ("Pet. for Cert.") was filed on July 24, 2002. Petitioners urge that their petition herein should be considered in conjunction with No. 02-260.

* * *

On August 20, 2002, a petition for certiorari, styled as *Millcraft-SMS Services, L.L.C., et al.* v. *Underwood, Com.'r.*, No. 02-260 (hereinafter "*Millcraft-SMS*") was docketed in this court. That petition seeks review (and summary reversal) of *Patterson, Com.'r.* v. *Gladwin Corp., et al.*, 2002 Westlaw 1003524, __ So. 2d __ (Ala., May 17, 2002, no. 1001747), which petitioners herein have cited in their own petition. Pet. for Cert., 5 n.2, 6 n.2, 20, 22. Petitioners noted that Alabama case to explicate the importance of the matter raised by their first Question. Pet. for Cert. i. In both cases all the relevant taxpayers have filed returns disclosing the necessary information for ministers to compute the correct tax, and credit or refund the excess. *It remains for a court to determine a set of valid or "saved" tax rates and order redress*. No one (neither claimants nor ministers) could determine a refund until then, except by individualized haggling. Yet both state courts have dismissed the taxpayers' cases.

I. IMPORTANCE OF THE QUESTIONS

The important common question (in technical terms) is really whether the mandate of citizen "due process" encompasses a right to invoke equity practice in a trial court (via a "class action") or mandamus from a state supreme court, in the extraordinary tax case where a mass of known citizen-taxpayers brings a common restitutional claim arising from mass

collections under a statutory levy which is (or is challenged as being) unconstitutional. Actuarial law seems to tell the states (i) to collect taxes at their pleasure from all the citizens, and that (ii) their chances of keeping most of the money are quite good, regardless of the ultimate unconstitutionality of a given levying statute. Actuarial law demonstrates that most citizens will not follow all the special administrative steps required by positive state law as to separate post-return refund claims; most individuals won't be able to afford such steps. The Kansas administrative system works this way. Pet. for Cert. 4-5, 12-13 n.4, 16 n.8, 18. The genius of the two state systems as shown by the results below is that the problem of the mass unconstitutional state collections vanishes from view. It is the taxpayers who are put on trial in the state courts. Both petitions here raise the question of whether it is the multiplicitous state systems for redress which are defective in according due process.

II. PHRASING THE QUESTIONS

As to the "Question Presented" in *Millcraft-SMS*, compared to the first Question in the instant case, Pet. for Cert. i, the respective petitioners' phraseologies differ. The posture of the two cases is somewhat different. Petitioners here have been denied access to a court which can both adjudicate the case on the merits and order a restitutional remedy, good (simple, effective and "meaningful") for *all afflicted taxpayers under the circumstances*, in a single proceeding. In *Millcraft-SMS*, the problem is limited to refunds; this Court has already held that the relevant taxes were unconstitutional. In both cases, the respondents already know who the afflicted taxpayers are, and they have the relevant numerical information in their own files. That distinguishes these cases from the ordinary administrative dispute over some deduction or other, peculiar to one citizen.

Newsweek, Inc. v. *Florida Dept. Rev.*, 522 U.S. 442 (1998) (re access to court and refunds), and *Reich* v. *Collins*, 513 U.S. 106 (1994) (proscribing "bait and switch" as to apparent

remedies), upon which both petitioners rely, are in part rooted in older due process cases, arising from systematic illegality afflicting a "multiplicity" of wrongfully assessed taxpayers. *Carpenter* v. *Shaw*, 280 U.S. 363, 369 (1930); *Ward* v. *Love County (Okla.)*, 253 U.S. 17, 22-24 (1920). Cf., *United States* v. *Osage County (Okla.)*, 251 U.S. 128, 132-4 (1919). The issue in the latter three cases was not so much whether the *taxpayers* were "reasonable," or "average," or had simply proceeded to request a meaningful remedy by trial and error, or were dumb as a fencepost. The problem was not whether all of them could have anticipated all the ins and outs (or timed the shifts) of state procedural lore and judicial doctrine. The dispositive matters were that (1) the states had no power to collect any of the relevant taxes (in systematic contravention of federal rights) in the first place, and (2) the state remedial systems designed for correction of errors or omissions in simple ordinary cases wouldn't work. Cf., *Ogden City* v. *Armstrong*, 168 U.S. 224, 237-241 (1897) ("Where the tax was wholly void and illegal, as in this case, the statute and its remedies for error and irregularities have no application"). Such state remedies (whether ancient, statutory, or newly invented by state judicial doctrinal manipulation) were not exclusive where the denial of federal rights was systematic, affecting a multiplicity of "deprived" taxpayers. Equitable cognizance would work. Cf., *Tennessee* v. *Sneed*, 96 U.S. 69, 24 L. Ed. 610 (1877) (statutory refund remedy for one taxpayer, replacing original right to mandamus, must be simple and effective); *Davis* v. *Grey*, 83 U.S. (16 Wall.) 203, 232-3, 21 L. Ed. 447, 457 (1873) (not necessary to join all affected adverse claimants); *The City of Chicago* v. *Dows*, 78 U.S. (11 Wall.) 108, 112, 20 L. Ed. 65, 67 (1871) (multiplicity). So too, mandamus would work here.

Petitioners believe their first Question is whether the result below worked a denial of petitioners' due process rights (as to their federal claims), contrary to *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930) and *General Oil Co.* v. *Crain*, 209 U.S. 211(1908). The Supreme Court of Kansas is

the only court which has original jurisdiction to hear petitioners' substantive federal constitutional claims against the levying statutes and to order mass redress, in mandamus, for all afflicted citizens. Pet. for Cert. 6-7, 20, Pet. App. E, 55a-63a; *ibid.*, Pet. App. F, 67a-71a. Yet it terminated such claims without any specific holding for review here. At this point, petitioners have been deprived of their access to court; thus their common chose in action to seek an "order of the court" for ministerial refunds under K.S.A. § 79-32,105(c) is depreciated to actuarial insignificance. That is a "deprivation."

If the first Question really is whether the petitioner-taxpayers have behaved "reasonably," they cannot be faulted for noticing that Kansas statute law explicitly makes the respondents herein responsible for refunding or crediting income tax overpayments shown by an examination of any and all taxpayers' returns. K.S.A. § 79-32,105(c). Pet. for Cert. 10-14. It *does not require a post-return "claim,"* or that *each* taxpayer be before a court. That is why petitioners ultimately resorted to mandamus below. They made an eminently reasonable evaluation of what mandamus is for, and went to the right court. Kansas Constitution, Art. 3 § 3; Kansas Bill of Rights, § 3; K.S.A. § 60-801. The requested writ to respondents in this case would be "meaningful" relief within the diagnostic approach of *Reich* v. *Collins*, *supra*. It was not merely reasonable to invoke the original jurisdiction of the Supreme Court of Kansas; under the circumstances it was imperative.

III. UNCONSTITUTIONAL RESULTS

In the wake of the instant case and *Millcraft-SMS*, the purportedly exclusive state administrative systems, apparently permitting only piecemeal remedies, reveal a financial tontine in which most taxpayers will never get full constitutional redress, dollar for illicit dollar. All petitioners

garnered were two stentorian denials of any attention to their fundamental rights claims under the due process clause of the Fourteenth Amendment. Likewise, Alabama seems to have won the battle of *South Central Bell Tel. Co.* v. *Alabama*, 526 U.S. 160 (1999), as a matter of actuarial pecuniary gain, unless due process mandates otherwise.

CONCLUSION

The results so far in this case and in *Millcraft-SMS* amply demonstrate that either the state supreme courts, or taxpayers and the bar, have not fully absorbed the lessons of *Reich* v. *Collins*, 513 U.S. 106 (1994), and *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930). Both cases deserve review here (and summary reversal).

Respectfully submitted,

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